UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 7

SYSCO DETROIT, LLC,	:	
	:	
Respondent	:	Cases 07-CA-163131
	:	07-CA-163930
v.	:	07-CA-172824
	:	
LOCAL 337, INTERNATIONAL BROTHERHOOD OF TEAMSTERS (IBT)	:	
	:	
Charging Party	:	

RESPONDENT'S STATEMENT IN OPPOSITION TO COUNSEL FOR THE GENERAL COUNSEL'S REQUEST FOR SPECIAL PERMISSION TO APPEAL THE ORDER OF ADMINISTRATIVE LAW JUDGE

Respondent Sysco Detroit, LLC ("Sysco") files this Statement in Opposition to Counsel for the General Counsel's Request for Special Permission to Appeal the Order of Administrative Law Judge ("Request") filed on May 4, 2017. The National Labor Relations Board ("Board") should deny the Request for the following reasons: (1) the Counsel for the General Counsel's ("CGC") Request was filed untimely; (2) CGC and the Charging Party were not denied due process and the ALJ was not required to open the hearing; and (3) the ALJ properly granted Sysco's Motion to Dismiss and ordered the allegations in CGC's complaint deferred to the parties' grievance and arbitration procedure.

I. Counsel for The General Counsel's Request for Special Permission is Untimely

Section 102.26 of the Board's Rules and Regulations requires that a request for special permission to appeal a ruling by an ALJ be filed "promptly" with the Board. CGC's 10-day delay in filing the Request is not "prompt". In most cases, a request for special permission to

appeal is made within a few days after a ruling.[1] In addition, although the Board has not clarified what is meant by the term "prompt" in Section 102.26, Webster's Ninth Collegiate Dictionary defines "prompt" as "being quick to act" or "performed readily or immediately". In reliance on the ALJ's ruling, the Union and Sysco have already scheduled an arbitration date for the underlying dispute. To the extent CGC wanted to seek special permission to appeal, it should have done so immediately or at the very least notified the parties of its intention to do so. CGC's 10-day delay in filing the Request does not meet the definition of "prompt".

II. The Board's Rules Did Not Require the ALJ to Open the Hearing and The General Counsel Was Not Denied Due Process

Counsel for the General Counsel purports to quote Section 102.25 of the Board's Rules and Regulations in its entirety when arguing that an ALJ must open the hearing before ruling on any motion. However, the quoted language is incomplete. Section 102.25 has an important sentence before the language the CGC quotes that the CGC conveniently omits—"*An* administrative law judge designated by the chief administrative law judge…shall rule on all *prehearing motions*…and all such rulings shall be issued in writing and a copy served on each of the parties." By its terms the Rule envisions that a party may file "prehearing motions". And the Rule envisions that the ALJ ruling on said motions may be one other than the ALJ designated to conduct the hearing. If the ALJ has to open the hearing to rule on a motion to dismiss, it no longer is a "prehearing motion"; and certainly an ALJ ruling on such a motion who is not designated to conduct the hearing would not open the hearing before making a ruling. The CGC's argument is not logical.

[1] *See, e.g. DHSC, LLC d/b/a Affinity Medical Center,* Case no. 08-CA-090083 (ALJ denied motion to intervene on April 9, 2013, intervening party filed request for special permission to appeal on April 17, 2013); *Hogan Transports, Inc.*, Case no. 03-CA-107189 (employer's petition to revoke denied on September 23, 2013, employer's request for special permission to appeal filed on October 1, 2013); *Calhoun Foods, LLC d/b/a Key Food*, Case No. 29-CA-030861 (Order denying Respondent's request to withdraw from or modify stipulations reached with General Counsel issued on February 10, 2012, Respondent's request for special permission to appeal filed on February 13, 2012).

The language the CGC quotes does not mean what the CGC says it means. When read in the context of the entire Section (as opposed to in isolation as the CGC suggests), it is clear that the quoted language simply means that any motion filed after the hearing opens shall be ruled on by the ALJ designated to conduct the hearing.

Sysco properly filed a prehearing motion and the ALJ properly ruled on said motion without opening the hearing. Furthermore, the CGC's assertion that it and the Charging Party were somehow denied due process is baseless. The Motion was fully briefed. The CGC filed a one hundred fifty one page document opposing Sysco's Motion to Dismiss. In her ruling the ALJ states that she fully reviewed the CGC's filing.

III. The ALJ Correctly Ruled That the Complaint Allegations Should Be Deferred to the Parties' Grievance and Arbitration Procedure

A. Sysco And Its Collective Bargaining Relationship With The Union

Sysco operates a food distribution system that provides a full line of food products and a wide variety of food-related products to both independent and chain restaurant customers and other "away-from-home" locations such as healthcare and educational facilities. Sysco has enjoyed a mutually beneficial relationship with the Union for over 40 years. During all relevant times, the parties were signatory to a collective bargaining agreement which was effective from February 6, 2011 until February 6, 2016. In May 2016, they negotiated a new five year contract. (the "CBAs") (Ward Declaration ¶ 4).[2]

The CBAs provide that "all grievances arising under and during the term of this Agreement shall be settled in accordance with the [grievance-arbitration] procedure" and a grievance is defined as any "alleged violation of the specific provision or article of this agreement." (See Exhibits 1 and 2 to Ward Decl.). Article II provides that "the Employer shall

[2] CGC attached to its Request Sysco's prior filings (Attachments C, F, H, L, M and P). The Ward Declaration is attached as Exhibit B to Attachment C.

have the right to discharge or to otherwise discipline any employee for just cause, subject to the grievance and arbitration procedure." Consequently, all discipline, including discharge, is subject to the grievance and arbitration procedure. Moreover, the parties have routinely used the grievance and arbitration procedure for discipline and discharge matters. (Ward Decl. at ¶ 5)

Article VIII of the 2011-2016 CBA provides that:

The Employer shall have the right to amend, change, delete or add to the following Work Rules and Regulations and penalties for their violation, provided the Employer:

1. Provides written notice to the Union.

2. Post a notice of the change for ten (10) days.

An employee may challenge any such change through the grievance procedure up to ten (10) days from date posted. Any change so challenged will not take effect during the grievance process.

The parties have also used the grievance and arbitration process concerning changes to work rules. (Ward Decl. ¶ 5)

In the over four years preceding the filing of the charges, the Regional Director has not issued a Complaint against Sysco either for discharging or disciplining an employee in retaliation for engaging in protected concerted activity or for unilaterally implementing changes to work rules. In that same time frame, the Union has not filed a charge alleging either that an employee was disciplined/discharged for engaging in protected concerted activity or that Sysco unilaterally implemented changes to work rules. In this same time period, Sysco has not been adjudicated to have violated the Act in any manner. (Ward Decl. ¶ 3)

B. <u>The Collyer Prearbital Deferral Doctrine</u>

The Board has historically recognized a strong national policy favoring voluntary arbitration of disputes. *Olin* Corp., 268 NLRB 573, 574 (1984). Under certain circumstances, such as those in this case, it is more appropriate for the Regional Director to defer a determination on the merits of a charge pending the outcome of proceedings on related matters. *Casehandling Manual* §10118; *Collyer Insulated Wire,* 192 NLRB 837, 840-43 (1971). The Board's well-settled policy of pre-arbitral deferral seeks to both promote collective bargaining and promote the resolution of disputes pursuant to the procedures upon which the parties have agreed. *See United Technologies Corp.,* 268 NLRB 557, 558-59 (1984). The Board has recognized that "where an employer and a union have voluntarily elected to create a dispute resolution machinery culminating in final and binding arbitration, it is contrary to the basic principles of the Act for the Board to jump in the fray prior to an honest attempt by the parties to resolve their disputes through that machinery." *Id.* at 559.

Arbitration offers expeditious resolution of disputes, promotes industrial peace through adherence to the parties bargained for procedural mechanism for resolving disputes, and does not sacrifice statutory rights because the Board reserves jurisdiction post-arbitration ensuring that the process will function consistent with the Act. *See Collyer* at 843; *see also Alpha Beta Co.,* 273 NLRB 1546, 1547 (1985), *Babcock and Wilcox,* 363 NLRB No. 50 (2015).

Deferral of the resolution of a charge is appropriate where, as here: (1) the dispute arose within the confines of a long and productive bargaining relationship; (2) there is no claim of employer animosity to the employees' exercise of protected statutory rights; (3) the parties' agreement provides for arbitration of a very broad range of disputes; (4) the arbitration clause clearly encompasses the dispute; (5) the employer has asserted its willingness to utilize arbitration in resolving the dispute; and (6) the dispute is eminently well-suited to such

resolution. *Wonder Bread,* 343 NLRB 55, 55 (2004) and *United Cerebral Palsy of New York,* 347 NLRB 603, 605 (2006).

C. The Complaint Allegations Should Be Deferred To The Parties' Grievance-Arbitration Procedure

The disputes at issue in this case are directly covered by the parties' collective bargaining agreement. All the factors are present for deferral in this case:

- The Union and Sysco have enjoyed a mutually beneficial collective bargaining relationship for over 40 years. The parties are signatory to a collective bargaining agreement which is effective from February 6, 2016 to February 6, 2021;

- Cases 07-CA-163131 and 07-CA-172824 involve allegations of garden-variety discipline involving a single employee, and there is no general claim of employer animosity to the employees' exercise of protected statutory rights;

- Case 07-CA-163930 involves Sysco's contractual right to implement a modified workrule subject to arbitration over the issue of reasonableness and whether the terminations for using cell phones while operating a semi-truck were proper. Likewise, there is no general claim of employer animosity to the employees' exercise of protected statutory rights;

- In over four years preceding the filing of the charges, the Regional Director has not issued a Complaint against Sysco either for discharging or disciplining an employee in retaliation for engaging in concerted protected activity or for unilaterally implementing changes to work rules. In that same time frame, the Union has not filed a charge alleging either that an employee was disciplined/discharged for engaging in concerted protected activity or that Sysco unilaterally implemented changes to work rules. In this same time period, Sysco has not been adjudicated to have violated the Act in any manner;

- The Charges concern the discipline of a union steward and several drivers and changes to a work rule that are clearly subject to the grievance and arbitration procedure in the parties' CBA;

- Grievances have been initiated over the terminations and work rule change;

- The Employer and Union have processed the grievances and are committed to arbitrate them if the grievances are not otherwise mutually resolved. There is no "backlog" of pending arbitral matters and Sysco will cooperate in processing the grievance without interruption; and

- Because the parties routinely process disciplinary disputes through the Agreement's grievance-arbitration process, the current disputes are well-situated to resolution through arbitration.

The single allegation that Sysco violated 8(a)(3) and (1) by issuing discipline to a union steward as a reprisal for engaging in protected union activity does not, by itself, establish that there is a claim of employer animosity to employees' exercise of protected statutory rights. *Babcock*, 363 N.L.R.B. No. 50 (2015).

The Board has routinely "deferred cases involving alleged discrimination against union stewards where it was satisfied that the parties' grievance procedure '[could] be relied upon to function properly and to resolve the current disputes fairly." *Babcock*, 363 NLRB No. 50 *citing United Aircraft Corp.*, 204 N.L.R.B. 879, 879 (1972), review denied sub nom. *Machinists Lodges 700, 743 v. NLRB*, 525 F.2d 237 (2nd Cir. 1975); *United Beef* Co., 272 N.L.R.B. 66 (1984); *United Technologies Corp.*, 268 N.L.R.B. 557, 558 (1984).

The allegation that Sysco "has maintained" the referenced Social Media Policy since October 30, 2015, i.e., still maintains such a policy, is false. Within approximately 2 weeks after the filing of the charge in Case 07-CA-172824, Sysco withdrew its Social Media Policy and provided notice of the same to all employees on April 14, 2016. (Ward Decl. ¶ 8). Sysco also provided notice of the withdrawal of this policy to the General Counsel. While the withdrawn policy was in effect, Sysco did not enforce or discipline any employees for postings that allegedly violated the policy. *(Id.).* Moreover, James Ward does not believe the policy was ever enforced. *(Id.* at ¶¶ 8). Consequently, the only potential relevance of this rescinded policy

is with respect to Mr. Gordon's discharge — which has been the subject of all three Complaints filed against Sysco.

In that regard, Mr. Gordon was discharged on October 13, 2015 for violation of Work Rule 1-11 which prohibits employees from falsifying productivity records. The GC concedes that Mr. Gordon was discharged on this date, and it is specifically pled in both the Amended and Second Amended Complaints. *(See* Amended Complaint and Second Amended Complaint at ¶ 10(b)). Thus, the Facebook posts at issue, as well as the allegations of discriminatory conduct by Sysco on November 10, 2015, all took place after Mr. Gordon was no longer an employee. Moreover, Sysco never actually disciplined former employee Gordon, and instead voided the notice of potential discipline regarding Mr. Gordon's post-termination comments on Facebook. Thus, the Social Media Policy has no causal relationship to Mr. Gordon's discharge and Sysco has never, and does not now, rely upon that policy to support its decision to discharge Mr. Gordon.

Notwithstanding the foregoing, to the extent the existence of the Social Media Policy has any continuing relevance to Mr. Gordon's discharge, the issue of whether the policy itself violates the Act will never be before the arbitrator and therefore, is not interrelated to the charge concerning Mr. Gordon's termination so as to render deferral inappropriate.

Mr. Gordon has filed grievances regarding both his October 13, 2015 discharge and the November 10, 2015 voided notice of potential discipline. The parties are processing these grievances. When the parties proceed to arbitrate these grievances, the question before the arbitrator will be whether Mr. Gordon was discharged for just cause under the collective bargaining agreement. Sysco will not be relying upon a rescinded Social Media Policy to support its discharge of Mr. Gordon and in fact, concedes that a violation of the Social Media

Policy contained in Work Rule 1-12 did not, and does not now, provide just cause to terminate Mr. Gordon. Indeed, the Social Media Policy has absolutely no causal relationship to Mr. Gordon's discharge. Accordingly, because Sysco is not relying upon the policy to provide just cause, the arbitrator will never have occasion to decide whether the policy violates the Act. Moreover, to the limited extent that Mr. Gordon might raise the Social Media Policy and assert that it formed the basis of his termination, the arbitrator can properly determine, in assessing just cause, why Sysco terminated Mr. Gordon's employment. That determination however, is related solely to the just cause analysis and is properly before the arbitrator.

The implementation of the work rule in Case 07-CA-163930 also does not establish general animosity towards employee rights and is merely a breach of contract case routinely submitted to arbitration. "As the Board has stated in *Vickers, Inc.,* 153 N.L.R.B. 561, 570 (1965), when "an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it," the Board will not enter the dispute to serve the function of arbitrator in determining which party's interpretation is correct." *NCR Corporation,* 271 N.L.R.B. 1212, 1213 (N.L.R.B. 1984). *See also Timken Roller Bearing* Co. *v. N.L.R.B.,* 161 F.2d 949, 955 (6th Cir. 1947); *Consolidated Aircraft Corp.,* 47 N.L.R.B. 694, 706 (1943), *enfd.* 141 F.2d 785 (9th Cir. 1944); *National Dairy Products Corp.,* 126 N.L.R.B. 434, 439 (1960).

The case before the Judge involves nothing more than a garden variety breach of contract case and a "mere breach of the contract is not in itself an unfair labor practice." See *Pleasantview Nursing Home, Inc. v NLRB*, 351 F.3d 747 (6th Cir. 2003); see also *NLRB v. C & C Plywood Corp.,* 385 U.S. 421, 427, 87 S.Ct. 559, 17 L.Ed.2d 486 (1967) ("Congress determined that the Board should not have general jurisdiction over all alleged violations of

collective bargaining agreements."). *Employees v. Westinghouse Electric Corp.,* 348 U.S. 437 fn. 2 (1955); *National Dairy Products Corp.,* at 439; *United Telephone* Co., 112 N.L.R.B. 779, 782 (1955). Indeed, the face of the complaint only alleges that Sysco failed to continue in effect all terms and conditions of the CBA by changing the penalty provisions of the distracted driving policy by failing to give advance notice and "without following the other procedural conditions to change a Work Rule required by the CBA." (Consolidated Complaint at ¶13(a) and (b). The General Counsel does not dispute that Sysco had the right to change the penalty provision and only alleges that Sysco breached the contract by failing to follow the contractual procedure to change a work rule. This is not an unfair labor practice, but rather a breach of contract case that is particularly well-suited for arbitration.

The Board has routinely deferred to the arbitration process in cases to determine if a Company had a unilateral right to implement work rules. Cf. *Speilberg Manufacturing Company,* 112 N.L.R.B. 1080 (1955) / *Olin Corp.*, 268 NLRB 573 (1984)("It hardly needs repeating that national policy strongly favors the voluntary arbitration of disputes. The importance of arbitration in the overall scheme of Federal labor law has been stressed in innumerable contexts and forums."); *The Hoover Company,* 307 N.L.R.B. 524, 526 (N.L.R.B. 1992)(post arbitration deferral case relying on an arbitrator's decision that Company had the right to unilaterally implement work rules).

D. <u>The General Counsel's Positions on Deferral are Wrong</u>

1. The Section 8(a)(5) Charge Must be Deferred to the Contract's Grievance & Arbitration Process.

The CGC's argument opposing deferral with respect to the modified work rule allegations is twofold: (1) if the contract is unambiguous, Board precedent will find deferral to be inappropriate; and (2) even if properly deferrable, Board law does not mandate deferral if

another aspect of the dispute is not deferrable and both have a close interrelationship. For the reasons set forth below, the CGC's argument is groundless.

The lone case cited by the CGC in support of prong one is not even applicable. In *Grane Health Care, Inc.*, 337 NLRB 432 (2002), the ALJ found that the respondent waived its deferral defense as it failed to assert deferral in its answer or at trial. *Id.* at 436. More importantly, the ALJ in *Grane* found that respondent denied the union's grievance as untimely and therefore, practically, the matter could not be deferred to the contract's grievance/arbitration process. *Id.* Nowhere does the Board, or the ALJ, mandate that deferral is inappropriate in situations "where a contractual provision is free from ambiguity." Rather, the ALJ found that in addition to the reasons aforementioned and the fact that the contract language was clear and no special interpretation skills of an arbitrator would be helpful, "[o]n balance . . . [he] would not defer this matter to the agreement's arbitration procedures." *Grane*, 337 NLRB at 436.

Unlike in *Grane*, the parties are simultaneously processing the grievances relating to the modified work rule through the grievance/arbitration procedure. In fact, the parties have chosen an arbitrator and have set a hearing date. Further, Sysco timely asserted deferral as an affirmative defense to this charge in filing its Motion to Dismiss in response to the CGC's Complaint.

While the CGC claims that the language at issue is clear and unambiguous, obviously the CGC's interpretation differs greatly from Sysco's interpretation. The cases where the Board found deferral to be inappropriate due to unambiguous contract language were instances in which the company blatantly violated the contract language and took unilateral action. *See, e.g.*, *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063 (1973) (company unilaterally changed wages mid-contract); *Grane*, 337 NLRB 432 (company unilaterally changed wages mid-contract). *But*

see Hoffman Air & Filtration Systems., 312 NLRB 349 (1993) (finding deferral of one charge appropriate for 8(a)(5) violation allegations regarding unilateral changes concerning plant rules, overtime pay, and restrictions on conduct of union business & finding that the charge was not interrelated with other nondeferrable allegations).

The ALJ here correctly ruled that the special interpretation skills of an arbitrator would be helpful in determining whether the company properly followed the contract in amending a work rule and its subsequent penalties. Specifically, the arbitrator must determine what constitutes proper notice, and if a withdrawn employee challenge to the amended work rule satisfies the requirements to stall this amended work rule from taking effect.

This is not a matter of the Respondent unilaterally altering the process of amending a work rule or regulation. Respondent provided written notice to the Union and Respondent posted the amended work rule for ten days prior to implementation. The parties differ on whether the amended work rule should have gone into effect based on a withdrawn employee challenge. The ALJ correctly found that an arbitrator must determine (1) whether Alfredo Harris's withdrawn grievance preserved the challenge necessary to trigger a stall in implementation of the amended work rule and (2) whether the grievance and arbitration process was properly followed. The only issue that is "free from ambiguity" is that the CGC and Sysco agree that Sysco has the right to amend its work rules, regulations and penalties.

Most cases where the Board has found deferral unwarranted based on the CGC's position have involved the payment (or lack of) wages or benefits, not matters "involving alleged unilateral changes in terms less vital to the essence of the employment relationship." *United Hoisting & Scaffolding, Inc.*, 2014 NLRB LEXIS at *20-21, footnote 7 (finding that deferral of charge was appropriate when resolution of the charge involved interpretation of the

management-rights clause and zipper clause). "[T]he cases declining to defer on the basis of clear and unambiguous language involve explicitly defined rights and obligations such as wage rates and fund contribution requirements." *Id.* at *26.

This case involves interpretation of work rules and a provision in the contract as well as the arbitration and grievance procedure and the management rights clause, not wages or benefits. The Board has supported deferral of charges relating to unilateral implementation of work rules and violations of 8(a)(5). *See e.g., United Hoisting & Scaffolding, Inc.*, 2014 NLRB LEXIS 524; *Hoffman Air & Filtration Systems*, 312 NLRB 349 (1993); *Transport Service Co.*, 282 NLRB 111 (1986).

The ALJ correctly found that the allegations should be deferred to the grievance and arbitration process contained in the collective bargaining agreement pursuant to *Collyer Insulated Wire*, and accordingly she correctly dismissed the complaint. 192 NLRB 837 (1971). All six components of *Collyer* are present (the CGC does not dispute this fact).

> The GC does not dispute that
>
> the parties' dispute arises within the confines of a long and productive collective-bargaining relationship; there is no claim of animosity to employees' exercise of Section 7 rights; the parties' agreement provides for arbitration in a broad range of disputes; the parties' arbitration clause clearly en-compasses the dispute at issue; the party seeking deferral has asserted its willingness to utilize arbitration to resolve the dispute; and the dispute is well suited to resolution by arbitration.

United Hoisting & Scaffolding, Inc., 2014 NLRB LEXIS at *16-17, citing *Sheet Metal Workers Local 18—Wisconsin*, 2013 NLRB LEXIS 340 (May 13, 2013). In fact, the CGC's sole argument that deferral is inappropriate is that the contract is unambiguous. However, as stated above, this

is not the case—contract interpretation is pivotal to determining whether Sysco or Local 337 will prevail. Accordingly, the allegations relating to unilateral implementation of an amended work rule must be deferred.

2. The Section 8(a)(3) Charge Must be Deferred to the Contract's Grievance & Arbitration Process.

Conceding the five *Collyer* pre-arbitral deferral requirements, the CGC opposes deferral solely on the basis that the parties' agreement does not contain a provision prohibiting discrimination based on an employee's union activity. Specifically, the CGC claims that the 8(a)(3) allegation is not deferrable based on the fourth prong of the *Collyer* test—the arbitration clause clearly compasses the dispute at issue.

However, the parties' contract provides that "[i]t is agreed that all grievances arising under and during the term of this Agreement shall be settled in accordance with the procedure provided below . . . . A grievance is defined as an alleged violation of the specific provision or article of this agreement. . . . In the event the last step fails to settle the complaint, it shall be referred to arbitration upon request of either the Union or the Employer." (CBA, Article VIII, Sections 1-2, pp. 9-10). Further, the contract expressly provides that Sysco will conduct all practices relating to discipline and termination in a manner that complies with all applicable federal and state laws. (CBA, p. 1). Compliance with the NLRA, and specifically Section 7, is encompassed in the parties' contract as it provides for arbitration of a very broad range of issues.

In *Babcock & Wilcox*, 2015 NLRB LEXIS 888 (Dec. 3, 2015), the Board dismissed a Section 8(a)(3) allegation because deferral was appropriate under similar circumstances at play here. In *Babcock & Wilcox*, the collective bargaining agreement's grievance and arbitration procedure provided that "[a]ll differences, disputes, or grievances between the Company and the Union pertaining to the terms of this Agreement, that shall not have been satisfactorily settled

after following the grievance procedure . . . , shall be submitted to an Arbitrator whose written decisions shall be final and binding upon both parties." 2015 NLRB LEXIS at *3. The GC in the *Babcock & Wilcox* case claimed that deferral was inappropriate for similar reasons asserted by the GC in this case—there is a claim of employer animosity to the employee's exercise of protected statutory rights and the arbitration clause does not clearly encompass the dispute at issue. *Id.* at *5. The Board found that there is no *per se* rule to defer cases about fairness or availability of the grievance procedure, but rather "the Board has deferred cases involving discrimination against union stewards where it was satisfied the parties' grievance procedure could reasonably be relied upon to function properly and to resolve the current disputes fairly." *Id.* at *8.

The ALJ correctly notes that the parties have a long history of processing terminations through the grievance and arbitration procedure, and in fact, this process is already underway for Mr. Gordon. Mr. Gordon's termination has been grieved and is being processed through the parties' grievance and arbitration procedure.

It appears that the CGC wishes to apply the new deferral standard outlined in *Babcock & Wilcox Construction Co.*, 2014 NLRB LEXIS 964 (Dec. 15, 2014), in which 8(a)(1) and 8(a)(3) charges would no longer be deferred unless the arbitrator is explicitly authorized to decide the unfair labor practice issue. *Id.* at *59. However, this new standard is not be applied retroactively, and the CGC's argument runs directly contrary to both Board law and the GC's Memorandum issued on February 10, 2015 declaring that if a grievance arose under a contract executed on or before December 15, 2014, this new standard will not apply. *Id.* at *66.

3. The Two Charges Are Not Interrelated and the Section 8(a)(5) Charge Must be Deferred.

The Board has held that it will not defer one issue if it is closely related to another issue that is not deferrable, finding that "it would not be prudent to require litigation of related issues in more than one forum." *Hoffman Air & Filtration Systems*, 312 NLRB at 352. Even if the Board were to find that the Section 8(a)(3) allegations regarding Mr. Gordon are not appropriate for deferral, it must defer the 8(a)(5) allegations regarding the amended work rule. Here, the two charges are not factually or legally interrelated, and there is no reason why deferral of the 8(a)(5) charge should be declined, particularly since it is ripe for arbitration. *Id.* at 353.

The 8(a)(5) allegations involve a review of the following contract provisions: management rights' clause, work rules and regulations clause, and grievance and arbitration procedure, as well as a determination of whether Sysco properly followed the contract in implementing the amended work rule. The 8(a)(3) allegations involve discriminatory discipline of a former union steward. There are no allegations that Sysco acted with union animus in implementing a work rule prohibiting employees from operating a motor vehicle and using a cell phone. In fact, the two charges involve a different set of individuals and implicate different provisions of the contract. Analysis of the 8(a)(3) charge will not be accomplished by a proceeding on the 8(a)(5) charge—quite simply, they have no relationship to one another, let alone a close interrelationship. Prior to its April 18 filing in opposition to Sysco's Motion, the CGC's sole argument that the 8(a)(5) charge not be deferred because of the 8(a)(3) charge was a sweeping and unsupported statement that "both have a close interrelationship." This alone is insufficient to support non-deferral.

In its April 18 filing, the CGC for the first time alleged that Gordon was discharged because he spoke out against the change to the distracted driving policy. This was not alleged in the unfair labor practice charge. It is not alleged in the Second Amended Complaint. And, the

CGC has not alleged it in any of its previous filings on the deferral issues. It is a red herring, alleged here for the sole purpose of trying to defeat deferral. There is no evidence to support the allegation. Moreover, it is not even part of the CGC's case.

Accordingly, the 8(a)(5) charge regarding unilateral implementation of the amended work rule must be deferred to the parties' grievance and arbitration procedure regardless of whether the Gordon charge is deferred.

IV. Because Deferral Is Appropriate, Sysco's Motion to Dismiss Was Properly Granted By The ALJ

The determination of whether a case should be deferred is a threshold question which must be "decided in the negative before the merits of the unfair labor practice allegations can be considered." *Canton-Potsdam Hosp.*, 2014 NLRB LEXIS 327, 22-23 (May 1, 2014). If deferral is appropriate, then a motion to dismiss should be granted. *See, e.g., Babcock,* 363 N.L.R.B. No. 50 (2015); *Urban N. Patman*, 197 NLRB 1222, 1223 (1972).

As all the required elements for deferral are present, the ALJ correctly granted the motion to dismiss. Indeed, pursuant to the *Casehandling Manual* §10118, when all of the *Collyer* elements are present, a Charge is required to be deferred.

V. CONCLUSION

For all the reasons set forth above, Sysco respectfully requests that CGC's Request be denied.

Respectfully submitted,

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been duly served upon the following by email this 8th day of May, 2017:

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